

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

No. 06-4494

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ZACARIAS MOUSSAOUI,

Defendant-Appellant.

Transcript of the CIPA proceedings when held on  
January 26, 2009, before the United States Court of Appeals for  
the Fourth Circuit in Richmond, Virginia.

APPEARANCES:

PRESIDING JUDGES:

THE HON. KAREN J. WILLIAMS,  
Chief Judge  
THE HON. ROGER L. GREGORY  
THE HON. WILLIAM B. TRAXLER, JR.

FOR PLAINTIFF-APPELLEE:

KEVIN R. GINGRAS, ESQ.  
Appellate Section, Criminal Division  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

(APPEARANCES CONT'D. ON PAGE 2)

1 APPEARANCES: (Cont'd.)

2 FOR PLAINTIFF-APPELLEE: DAVID J. NOVAK, AUSA  
3 DAVID B. GOODHAND, AUSA  
4 United States Attorney's Office  
5 2100 Jamieson Avenue  
6 Alexandria, VA 22314

7 FOR DEFENDANT-APPELLANT: JUSTIN S. ANTONIPILLAI, ESQ.  
8 REBECCA L. D. GORDON, ESQ.  
9 JOSEPH M. MEADOWS, ESQ.  
10 ROBERT ALEXANDER SCHWARTZ, ESQ.  
11 DANIELLE M. GARTEN, ESQ.  
12 WHITNEY A. MOORE, ESQ.  
13 Arnold & Porter, LLP  
14 555 Twelfth Street, N.W.  
15 Washington, D.C. 20004  
16 and  
17 BARBARA LYNN HARTUNG, ESQ.  
18 700 East Main Street, 16th Floor  
19 Richmond, VA 23219

20 COURT SECURITY OFFICER: DANIEL O. HARTENSTINE

21 COURT REPORTER: ANNELIESE J. THOMSON, RDR, CRR  
22 U.S. District Court, Fifth Floor  
23 401 Courthouse Square  
24 Alexandria, VA 22314  
25 (703)299-8595

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

No. 06-4494

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ZACARIAS MOUSSAOUI,

Defendant-Appellant.

Transcript of the CIPA proceedings when held on  
January 26, 2009, before the United States Court of Appeals for  
the Fourth Circuit in Richmond, Virginia.

APPEARANCES:

PRESIDING JUDGES:

THE HON. KAREN J. WILLIAMS,  
Chief Judge  
THE HON. ROGER L. GREGORY  
THE HON. WILLIAM B. TRAXLER, JR.

FOR PLAINTIFF-APPELLEE:

KEVIN R. GINGRAS, ESQ.  
Appellate Section, Criminal Division  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

(APPEARANCES CONT'D. ON PAGE 2)

~~TopSecret/Codeword~~

2

1 APPEARANCES: (Cont'd.)

2 FOR PLAINTIFF-APPELLEE: DAVID J. NOVAK, AUSA  
3 DAVID B. GOODHAND, AUSA  
4 United States Attorney's Office  
2100 Jamieson Avenue  
Alexandria, VA 22314

5  
6 FOR DEFENDANT-APPELLANT: JUSTIN S. ANTONIPILLAI, ESQ.  
7 REBECCA L. D. GORDON, ESQ.  
8 JOSEPH M. MEADOWS, ESQ.  
9 ROBERT ALEXANDER SCHWARTZ, ESQ.  
DANIELLE M. GARTEN, ESQ.  
10 WHITNEY A. MOORE, ESQ.  
Arnold & Porter, LLP  
555 Twelfth Street, N.W.  
Washington, D.C. 20004  
and  
11 BARBARA LYNN HARTUNG, ESQ.  
12 700 East Main Street, 16th Floor  
Richmond, VA 23219

13  
14 COURT SECURITY OFFICER: DANIEL O. HARTENSTINE

15  
16 COURT REPORTER: ANNELIESE J. THOMSON, RDR, CRR  
17 U.S. District Court, Fifth Floor  
401 Courthouse Square  
18 Alexandria, VA 22314  
(703)299-8595

19  
20  
21  
22  
23  
24  
25

~~TopSecret/Codeword~~

3

1 P R O C E E D I N G S

2 JUDGE WILLIAMS: Well, welcome to a new venue. Thank  
3 you.

4 Mr. Antonipillai, are you going to start with us first?

5 Oh, yeah, maybe we should make sure that everyone is  
6 cleared and there's no question about that.

7 THE COURT SECURITY OFFICER: They are, Your Honor.

8 JUDGE WILLIAMS: Okay. Thank you.

9 You may proceed.

10 MR. ANTONIPILLAI: Good morning, and may it please the  
11 Court, Justin Antonipillai again on behalf of -- Arnold & Porter,  
12 on behalf of Zacarias Moussaoui. During the closed session, I  
13 was -- I had planned to just address a couple of points, and I'll  
14 take again any questions the panel has first.

15 I was first going to address the motion to remand that  
16 we had filed and some of the arguments in there under the  
17 supposition that it hasn't -- the reviewed motion has not yet been  
18 ruled upon. I had a couple of points that I had discussed in the  
19 open session but that have cites in the, in the CIPA record, so I  
20 was going to provide those and discuss those briefly, and then I  
21 was going to cover some of the other CIPA materials that the  
22 district court had deemed to be *Brady* and are in the classified  
23 record but hadn't been produced at the time of the plea.

24 First on the motion to remand, we have requested very  
25 limited relief on the motion to remand given the disclosures that

~~TopSecret/Codeword~~

4

1 have been provided by the government. The government has  
2 basically disclosed that there -- that notwithstanding the  
3 district court's specific questions to counsel for the government  
4 at the time before the plea and after the plea about whether the  
5 detainee interrogations were being taped and notwithstanding the  
6 fact that the representations -- obviously not, as I understand  
7 it -- and counsel, we have no reason to believe counsel knew any  
8 of this, but as I understand it, [REDACTED] made an incorrect  
9 representation to the court at least twice with respect to the  
10 taping of the interrogations.

11 All we have requested is a remand to the district court  
12 so that the district court may just examine what happened, and  
13 what happened, I'm not saying do a broad investigation, but  
14 determine how it is that a specific request like one made by the  
15 district court about the taping turned out to be so wrong when the  
16 answer was given, what the scope is of the taping that occurred,  
17 and whether any of the tapes that exist now or existed in the past  
18 could have, in fact, affected the plea that Moussaoui entered or  
19 the sentence that he received.

20 That's very limited relief. The Court in other cases  
21 that we've cited has done exactly that.

22 The issue, as I understand it as the government states  
23 it is that there's no reason to go through that particular process  
24 because it could not have possibly affected Moussaoui's plea or  
25 the --

~~TopSecret/Codeword~~

5

1 JUDGE TRAXLER: I hate to interrupt you --

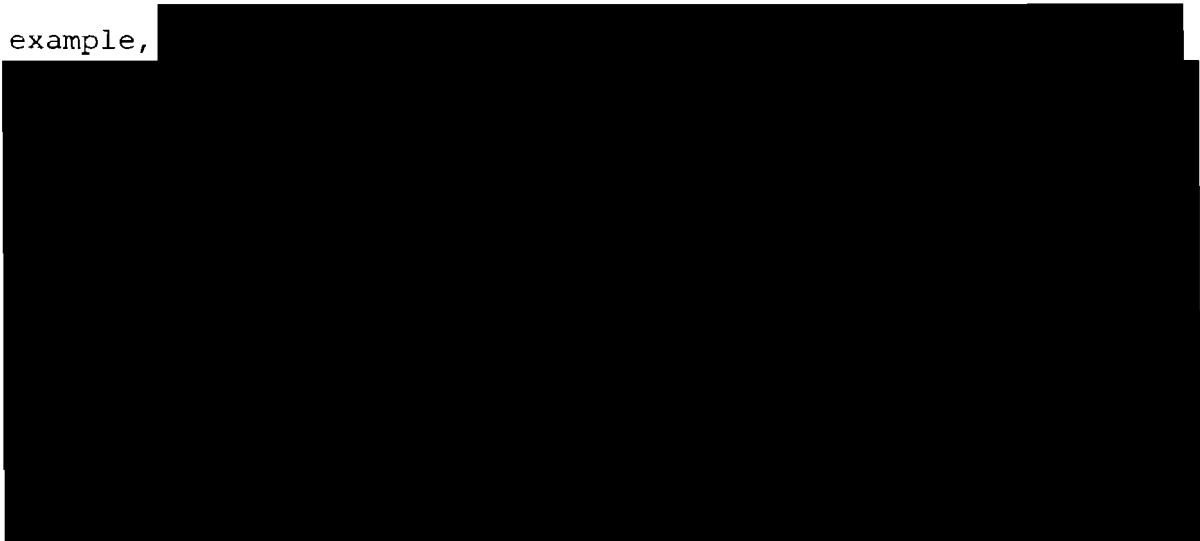
2 MR. ANTONIPILLAI: Sure.

3 JUDGE TRAXLER: -- but I want -- you're at a point I  
4 want to pursue a little bit.

5 MR. ANTONIPILLAI: Sure.

6 JUDGE TRAXLER: What is the end game in this? In other  
7 words, what relief is it if things turn out as well for you as  
8 they possibly could, what relief then will you seek? Are you  
9 asking to vacate the plea? Are you asking for resentencing? What  
10 is -- where are we headed with this?

11 MR. ANTONIPILLAI: If they turned out as, you know, I  
12 hate to say best for us, because that in some ways is bad just for  
13 the system, but if they turned out really, really to show  
14 egregious misconduct in terms of lies to the district court that  
15 were intentional or it turns out there are a lot of other tapes  
16 that are either in existence now or were in existence or they're  
17 available on demand, now, the district court may conclude, for  
18 example,



19  
20  
21  
22  
23  
24  
25

~~TopSecret/Codeword~~

6

1 I'm not requesting -- if all that occurs and it's really  
2 egregious, it would be a basis to declare the plea involuntary or  
3 unknowing, because Moussaoui's plea, he, he made very clear that  
4 he found the entire substitution process highly offensive, because  
5 he thought that there were witnesses out there that could  
6 exculpate him from participating in the 9/11 conspiracy.

7 And obviously, I'm not asking for a review of that  
8 issue, because the panel has already ruled on it, but it was clear  
9 that the reliability of the substitutes and their, their use at  
10 trial was a critical issue to Moussaoui at the time of the plea,  
11 and so if it turns out to be really egregious, No. 1, if it's  
12 intentional or reckless conduct [REDACTED] that resulted in the  
13 misstatement, that's a due process violation, and that could  
14 affect the plea, and second, depending on what it is that's, in  
15 fact, out there that may have demonstrated that the, that the  
16 statements by the witnesses were or were not reliable, that would  
17 affect -- would have affected Moussaoui's decision to plead  
18 guilty. That's the, that's the argument.

19 JUDGE TRAXLER: All right. Where an issue like this  
20 arises after sentencing, what is the standard of review or what is  
21 the standard on which your request would be measured?

22 MR. ANTONIPILLAI: I believe we would have to prove  
23 that, that there is a -- well, it would have to affect the plea in  
24 some way. It would either have to affect --

25 JUDGE TRAXLER: No, it's more than that. I would --



~~TopSecret/Codeword~~

7

1 MR. ANTONIPILLAI: No, no, no, I meant -- I apologize.  
2 That wasn't the end of my sentence. You would have to prove that  
3 but for this evidence, that he would have not entered a plea of  
4 guilty, in other words, that a reasonable person getting this  
5 information under the circumstances where he was may have  
6 resulted -- I think the language, and I'm forgetting it precisely,  
7 is --

8 JUDGE TRAXLER: I believe the standard is whether or not  
9 there's been a miscarriage of justice.

10 MR. ANTONIPILLAI: That's for the due process violation,  
11 I think, Judge Traxler. I mean, in other words, I think there are  
12 cases saying that if there, if there was a -- if the conduct was  
13 intentional or reckless, that could, in fact, be a due process  
14 violation, and then you look at the, whether or not it was a  
15 miscarriage of justice.

16 For the, for the purposes of a post-plea, post-plea  
17 disclosure essentially that your statement was wrong, if it turns  
18 out that there's *Brady* in there, you would go through the normal  
19 *Brady* analysis that we talked about in the first session, which is  
20 if the defendant had that *Brady* at the time of the plea, is there  
21 a probability from an objective standpoint that he would have  
22 changed his mind.

23 Again, I understand the Court's reluctance on this  
24 issue, and I've seen it, obviously, from the prior denial of our  
25 motion to remand, but there was an awful lot that has been

~~TopSecret/Codeword~~

8

1 disclosed about how, No. 1, how is it that that, especially the

2

3

4

5

6

7

8

9

10

11

12 That's -- I think the judge -- I think a district judge  
13 ought to be able to trust the representation of the government  
14 under the two circumstances in which the question was asked. The  
15 first one was --

16 JUDGE WILLIAMS: How about circuit judges when they ask  
17 that same question, too?

18 MR. ANTONIPILLAI: Yeah. And, Judge Williams, that's  
19 exactly right.

20 JUDGE WILLIAMS: Yeah. Two times I asked.

21 MR. ANTONIPILLAI: This Court's decision, twice, both  
22 yourself and Judge Wilkins asked one as well, asked the question  
23 specifically, "Is there raw material out there against which we  
24 can compare the intelligence summaries?"

25 Because remember, we didn't get -- the defense didn't

~~TopSecret/Codeword~~

9

1 get the raw cables. We only got the intelligence summaries, and I  
2 believe the Court got the cables and the intelligence summaries,  
3 but there were very specific questions, and there's a Fourth  
4 Circuit published opinion out there that says these interrogations  
5 were taken under conditions that are likely to render the  
6 statements reliable.

7           That is a -- first of all, that's the law of the case,  
8 and that's being thrown back at us every single time, and yet --  
9 and second, that's a precedent that's going to be cited regularly  
10 by the government especially in these kinds of cases, and yet  
11 there's a possibility -- I'm not saying it's out there; we just  
12 don't know -- but there's a good possibility that there's evidence  
13 out there that proves that that holding of the Fourth Circuit was  
14 wrong, and all we're asking for -- I'm sorry.

15           JUDGE WILLIAMS: As you say, it seems like it's a lot of  
16 these concerns are speculation, and the government's investigation  
17 remains ongoing, so isn't this a claim that would be better  
18 brought as a 2255 motion in the future, when you have some more  
19 information?

20           MR. ANTONIPILLAI: I don't believe so, Judge Williams,  
21 for a couple of reasons.

22           JUDGE WILLIAMS: Because a lot of stuff has been  
23 declassified from the first time that I saw this.

24           MR. ANTONIPILLAI: I agree, Judge Williams. I don't  
25 believe this has to wait until a 2255, because this is -- we've

~~TopSecret/Codeword~~

10

1 cited the cases *Al-Timimi* and others in which this very thing has  
2 happened and the Court just remands to go back to see what's going  
3 on.

4           We have, obviously, almost explicitly apologized in our  
5 briefs for speculating, but we can't do anything but speculate,  
6 because we don't know the facts, and the letters that were written  
7 by the government disclosing this, this is defensible, I know, I  
8 mean, but they're very artfully drafted. They're drafted very  
9 specifically. They're disclosing very specific information. So  
10 we're guessing as to what else might be out there, but we just  
11 don't know.

12           And the bottom line is the district court got an  
13 incorrect declaration twice. It was a very specific question.  
14 The second one asked for an all agencies verification of this  
15 information, so that was pretty specific, and they got incorrect  
16 information.

17           The district judge under those circumstances should be  
18 permitted to determine whether or not there's -- what happened and  
19 how it could be that that got the wrong information and how it  
20 affected the plea and how it affected the judge's other published  
21 rulings, and the same would go, once there's findings, the Fourth  
22 Circuit can then look at that and determine whether or not it  
23 affected the Fourth Circuit's published opinion, which is, as I  
24 said, law of the case and a published precedent which is going to  
25 be cited for all time.

~~TopSecret/Codeword~~

11

1 So this is clearly not a moot issue.

2 JUDGE TRAXLER: How could it have affected the plea?

3 How could it have affected the plea?

4 MR. ANTONIPILLAI: Let's say, for example -- and this is  
5 all speculation, so I'm speculating, but I have no other basis to  
6 do it.

7 JUDGE TRAXLER: All right.

8 MR. ANTONIPILLAI: Let's say there are tapes out there  
9 that are inconsistent with the statements we had received. In  
10 other words, for example, [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 JUDGE TRAXLER: Now, you're in the penalty phase now.  
14 I'm talking about the guilty plea.

15 MR. ANTONIPILLAI: This is relevant to the guilty plea.  
16 The [REDACTED] substitutions were produced pre-plea and,  
17 in fact, were shown to Moussaoui.

18 JUDGE TRAXLER: Right.

19 MR. ANTONIPILLAI: Okay? So let's say his substitution  
20 says: I thought Moussaoui was part of 9/11 -- I'm paraphrasing, I  
21 apologize -- but part of 9/11 because the only thing I was working  
22 on was 9/11.

23 Now, let's say that there's a tape [REDACTED] and  
24 the tape says, "I never thought he was part of 9/11. I thought he  
25 was completely cut out of 9/11, and I never believed" -- let's say

~~TopSecret/Codeword~~

12

1 there's an inconsistency between what the tape says and what the  
2 substitution says. Then we'd go through the normal *Brady*  
3 analysis.

4 The problem is we just don't know what's on the tapes,  
5 how many tapes are out there. We take the disclosures at their  
6 word. We are not questioning what the government's lawyers have  
7 said. We just --

8 JUDGE WILLIAMS: Well, aren't most of those prefaced by  
9 saying, "We don't know if this is going to be true or not; it's  
10 just what somebody is saying"?

11 MR. ANTONIPILLAI: I, I agree -- you mean that what the,  
12 what the letters from the government are saying?

13 JUDGE WILLIAMS: Well, and -- yes.

14 MR. ANTONIPILLAI: Oh, even the substitutions?

15 JUDGE WILLIAMS: Yes.

16 MR. ANTONIPILLAI: The substitutions, as I understand  
17 it, were written in a way to -- this is what the representations  
18 are on the record -- were basically indicated to have captured  
19 basically what's in the cables. My whole, my whole point here is  
20 now you have, it turns out, a whole other batch of raw data that,  
21 No. 1, may prove or disprove that the statements and the summaries  
22 that the defense got were accurate, and No. 2, it may prove or  
23 disprove whether or not the summaries are, in fact, reliable.

24 And that information may or may not be out there, I'm  
25 speculating, but the disclosures we've gotten give some indication

~~TopSecret/Codeword~~

13

1 that there could be a whole bunch of other tapes, and to have a  
2 district court judge -- to have Judge Brinkema's rulings out  
3 there, the Fourth Circuit's rulings out there, when there could be  
4 evidence out there that comes out from once the investigation is  
5 done and so forth or once -- that undermines both of those points,  
6 I think, undermines the integrity of the process, and it clearly  
7 could be relevant to Moussaoui's plea.

8           The reason we're just not demanding a vacatur of the  
9 plea, we don't have enough information about what is this  
10 evidence, so I can't come up here and argue yet that it's *Brady* or  
11 not *Brady*. I haven't even -- defense counsel have not even seen  
12 the transcripts of the tapes that were given, but our point is  
13 there may be more tapes, and that's the reason a remand is  
14 necessary under the circumstances.

15           JUDGE TRAXLER: Just as a practical matter, how would  
16 you determine if there are more tapes?

17           MR. ANTONIPILLAI: I think the district judge has done a  
18 lot of ex parte process. And again, I'm sensitive to the notion  
19 that this is not going to be some wild goose chase. There's a  
20 very -- there were specific representations made to the district  
21 court, and now there's been disclosures about tapes. There's an  
22 ongoing DOJ investigation.

23           I'm sure there are ways that either ex parte or with  
24 counsel participating there could be some specific questions to  
25 understand how it is that [REDACTED] filed those declarations that

~~TopSecret/Codeword~~

14

1 were clearly incorrect and that they should have known were  
2 incorrect, and two, the judge should be able to ask questions  
3 like, okay, look, you said that this one was taped and that you  
4 could get the tapes at any time. Were there other tapes that you  
5 can call at any time, or why was this one taped and not this one?

6 At least the judge should be able to ask the question.  
7 If they can't be answered, then they can't be answered, but at  
8 least the judge who got the incorrect declaration should know, be  
9 able to find out what happened.

10 The same argument, by the way, applies to the Carla  
11 Martin issue. Carla Martin is just a very simple issue, because  
12 the finding of death eligibility would have never occurred, the  
13 government agreed with this, had there been no substitution of  
14 Cammaroto, and now post -- and the judge, as we've made absolutely  
15 clear, was very upset, very upset about this issue and made  
16 absolutely -- she initially struck all of the aviation evidence.

17 Then the government proposed Cammaroto as a witness who  
18 was supposed to be completely untainted. This isn't a prejudice  
19 issue. This is an untainted witness as a result, somebody who was  
20 not affected by the violation of the rule on witnesses, and now  
21 post-plea, there are some e-mails, they look innocuous but there  
22 are some, some e-mails that actually indicate that he was not  
23 totally untainted, and the district judge should be able to look  
24 at that and figure out, No. 1, why is it that I've got sworn  
25 testimony saying that he had had no contact after this point and



~~TopSecret/Codeword~~

15

1 yet now there's e-mails indicating that there was, and second, was  
2 my order letting you have this witness come in and testify, which  
3 was the only way you could have even proven death eligibility, is  
4 that an appropriate -- was that an appropriate remedy? Because  
5 without the aviation evidence, there would have been no finding of  
6 death eligibility.

7 JUDGE TRAXLER: Is a remand the only way she can address  
8 these issues?

9 MR. ANTONIPILLAI: I believe so. I mean, I suppose -- I  
10 think in order to get it back to the district court in a fair way,  
11 you know, on a 2255, there's a lot of procedural differences  
12 between a 2255 and a remand, and that's why, I think, courts have  
13 tended to remand -- this Court has tended to remand the cases  
14 under these circumstances, to let the court -- the district court  
15 develop the record and get it up on direct appeal so that this  
16 Court has a proper record.

17 JUDGE TRAXLER: Well, wouldn't she, for example, have  
18 the same authority if she brought a contempt action, initiated a  
19 contempt action or something of that nature?

20 MR. ANTONIPILLAI: Possibly, Your Honor. Again, I don't  
21 know the answer to that off the top of my head.

22 JUDGE TRAXLER: I don't, either.

23 MR. ANTONIPILLAI: I know there's so many --

24 JUDGE TRAXLER: That's how come I asked you.

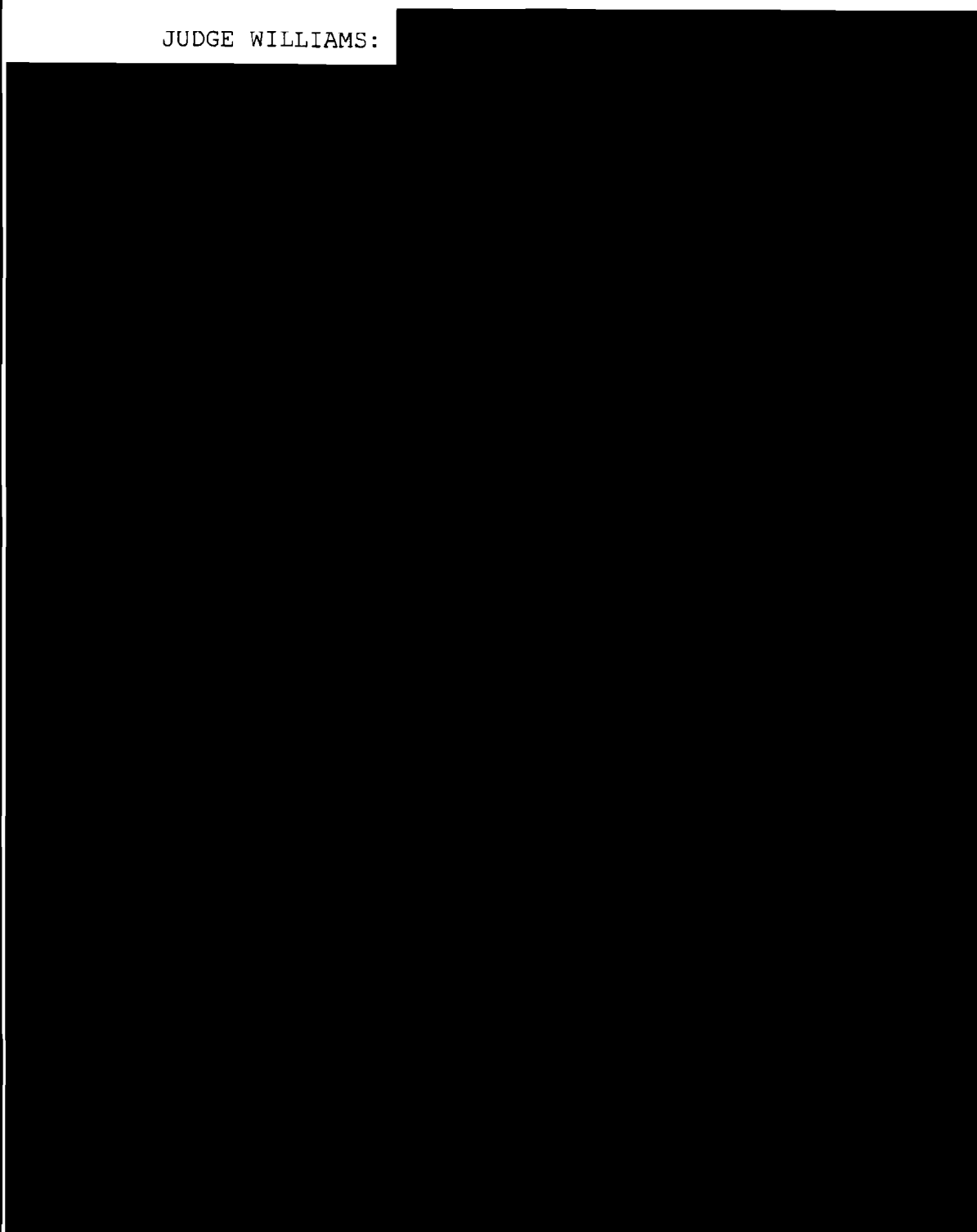
25 MR. ANTONIPILLAI: I apologize.

~~TopSecret/Codeword~~

16

1 The only -- I'm out of time, I see, and --

2 JUDGE WILLIAMS:



3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

~~TopSecret/Codeword~~

17

1 JUDGE WILLIAMS: Well, can Moussaoui make a showing that  
2 had he known about these tapes, that he would not have pled  
3 guilty?

4 MR. ANTONIPILLAI: I can't make that showing right now,  
5 Judge Williams, because I don't know what, I don't know what the  
6 tapes -- I don't know -- here's what I don't --

7 JUDGE WILLIAMS: There's nothing in the record to  
8 support it?

9 MR. ANTONIPILLAI: Right now, Your Honor, I don't -- I  
10 have not had access to the transcripts of the tapes that have been  
11 produced. I don't know how many tapes are out there. I don't  
12 know what tapes they have -- that are out there to which the  
13 government has access to. I just don't have enough information to  
14 say right now that we meet the standard to show that a *Brady*  
15 violation occurred and that a *Brady* violation would have affected  
16 the plea right now.

17 It could change, obviously, if there was an intentional  
18 conduct or something like that, but right now on the current  
19 record, we need more facts. That's been our request and what  
20 we've been saying.

21 I had two -- should I -- I'll steal my time and then  
22 come back at the rebuttal unless the Court has any questions.  
23 Thank you.

24 JUDGE WILLIAMS: Mr. Gingras?

25 MR. GINGRAS: Good morning again. May it please the

~~TopSecret/Codeword~~

18

1 Court. I apologize for -- first of all, we are not happy about  
2 the situation, obviously, as it's unfolded. We take our duty of  
3 candor very seriously, but this Court should not mistake us --  
4 mistake our attempts to correct the record and meet that duty for  
5 a suggestion that there's anything relevant to this case, that is,  
6 the defendant, Mr. Moussaoui.

7 The focus has to be on what did Moussaoui know; that is,  
8 did he know the charges against him, did he know the consequences  
9 of pleading guilty, and did he choose to do it. It's not -- the  
10 focus can't be on who in the government knew what when.

11 Clearly, this is not the situation that we would want to  
12 unfold, but the question has to be do any of these disclosures  
13 cast into doubt that Moussaoui understood those charges, knew the  
14 consequences, and that he voluntarily chose to plead guilty.

15 Now, the facts if you look at the record, they point to  
16 nothing under -- nothing in the papers -- and I'm glad to hear  
17 Mr. Antonipillai state it here -- that they're really just  
18 asserting that something could have affected the plea because he  
19 had no chance to challenge the reliability of the substitutions.

20 There's nothing in the record to support, not even a  
21 whisper, that he cared about the substitutions, and, in fact, the  
22 opposite --

23 JUDGE GREGORY: It's not a matter of whether he cared or  
24 not, counsel. It's a question in terms of what does, what does  
25 justice stand for. It's not just the result. It's a process.

~~TopSecret/Codeword~~

19

1           And the question is, you come here with the CIPA 4  
2 process and twice you came in here and then we poured over this  
3 and gave an opinion. It is important as to what is a reasonable  
4 substitute, because we want to honor and protect our country's  
5 safety, obviously, make sure classified information does not go  
6 into the wrong hands, but we also want to honor our Constitution  
7 and what is a fair trial under the Fifth Amendment and Sixth  
8 Amendment.

9           That process means more than just a result of whether or  
10 not, well, he can't show what he needed. No, it is very important  
11 because it undermines the whole idea of what is there that might  
12 assist, that the Court could look at and say is this a fair  
13 substitution. It's gatekeeping.

14           Well, they make this representation, but is there  
15 anything I could look at in my closed chambers and say that is a  
16 fair substitute? How can you do that if someone has undermined  
17 the process?

18           And no disparagement on counsel, but that's important to  
19 rely on our government to do that, and to say that, well, the  
20 whole issue here and whether or not it made a difference to him,  
21 it makes a difference to justice, and I want you to address that  
22 difference.

23           MR. GINGRAS: I completely agree with that sentiment,  
24 Judge Gregory.

25           JUDGE GREGORY: All right. Address that then.

~~TopSecret/Codeword~~

20

1 MR. GINGRAS: It is important that we understand what  
2 happened here, and there is a specific process that has been -- a  
3 serious criminal investigation that has been underway for over a  
4 year to get the bottom of that.

5 JUDGE GREGORY: Well, I don't want to talk about  
6 punishment. That's another -- that's not for us, but what is for  
7 us is I want you to address it in the context of the CIPA process  
8 that we ruled on, and that context of the district court's  
9 obligation, how does that now put us then in terms of verifying  
10 whether that was undermined or not?

11 MR. GINGRAS: That would go -- that was going to be my  
12 second point, Judge Gregory, and that is that the district court  
13 rejected the substitutions because there were no tapes. There is  
14 a, there is a representation made to the district court in a sworn  
15 declaration that there are no tapes, and the district court says  
16 because there are no tapes, the substitution -- the substitutions  
17 are unreliable, and they are not enough to protect Moussaoui's  
18 compulsory process rights.

19 This Court had that rationale squarely in front of it  
20 and determined that whether there were recordings or not was  
21 irrelevant because the, the people conducting the interrogations  
22 had a profound interest in obtaining accurate information from the  
23 witnesses and in reporting it accurately to those who could use it  
24 to stop further acts of terrorism and capture al Qaeda operatives.

25 And so the government made representations -- and this

~~TopSecret/Codeword~~

21

1 is still, this is still unassailable rationale from our  
2 perspective -- that the government was making life-or-death  
3 decisions allocating military and intelligence resources based on  
4 this information, and this Court said that those considerations  
5 provide sufficient indicia of reliability to alleviate the  
6 concerns of the district court, the concerns being about taping.

7           So with respect, Your Honor, again, we are not happy  
8 that there were misrepresentations made, but ultimately, for the  
9 holding of this Court, the question of whether there were tapes or  
10 not became completely irrelevant based on this rationale.

11           JUDGE GREGORY: What about -- okay. I follow that.  
12 What about -- that resolved, let's say, the half that, in terms of  
13 not the liability for prosecutorial purposes. What about in terms  
14 of the tapes might have content as to an exculpatory aspect of it?

15           MR. GINGRAS: Well, I think, Judge Gregory, that this  
16 Court had that same question in front of it when Solicitor General  
17 Paul Clement was up here last time and there was a discussion  
18 about cutting room floor material, and the Court reached -- and  
19 I'm sorry, I can't point to the footnote -- the conclusion that it  
20 was highly unlikely that that would occur, because after 9/11, the  
21 witnesses' statements were presumed to be, to be significant and  
22 presumptively disseminable.

23           And anything about Moussaoui was going to have foreign  
24 intelligence value; that is, he was an al Qaeda operative, and so  
25 anything about him, possible targets, missions, associates, is he

~~TopSecret/Codeword~~

22

1 not involved? Can we eliminate him from the equation, save  
2 resources, focus on who the real terrorists are, that that was  
3 enough of an indicia to conclude safely that there was such an  
4 insignificant chance that there would actually be lost material.

5 And the -- what we've recovered and disclosed to this  
6 Court bears that out. There's nothing -- there's no -- there's  
7 nothing that was exculpatory that wasn't produced to the defense,  
8 and there's nothing that wasn't already sort of produced in the --  
9 excuse me, not sort of -- produced in the Section 4 process.

10 JUDGE TRAXLER: Well, you know, earlier the  
11 representation was made to the Court that there are no tapes.  
12 Now, of course, we all know that there are some tapes. Now the  
13 representation is being made that's all there are, and --

14 MR. GINGRAS: No, Your Honor, I don't --

15 JUDGE TRAXLER: Oh, you think there are more?

16 MR. GINGRAS: I wouldn't want to stand up here and say  
17 that that's all there are. I mean, the --

18 JUDGE WILLIAMS: There are ones in other places, aren't  
19 they?

20 MR. GINGRAS: The -- we have been -- and I, I can  
21 represent to this Court that I checked just two days ago with  
22 Mr. Durham's investigation. They are keenly aware of our duty of  
23 candor to this Court, and anything that bears on this case they  
24 are bringing to our attention, and so what we have is what we  
25 have, but --



~~TopSecret/Codeword~~

23

1 JUDGE TRAXLER: But you're still asking us to accept  
2 your representation that you have provided the Court everything  
3 that exists.

4 MR. GINGRAS: No, Your Honor, I don't want to be  
5 mistaken for saying that we've provided everything that exists.  
6 My point is simply that we've provided what has been recovered and  
7 what has been in U.S. government possession, but ultimately, it  
8 doesn't matter whether there's a thousand tapes out there.

9 Again, we're not happy about this, but we can presume  
10 the worst for the purposes of this motion, that is, that there  
11 are, say, a bunch of tapes somewhere, but given the fact that,  
12 again, Moussaoui was who he was, anything about him was going to  
13 have foreign intelligence value, that the likelihood that there  
14 was going to be information that's just completely lost or  
15 completely exonerating him is completely unlikely.

16 JUDGE TRAXLER: Well, if you presumed the worst, then  
17 the worst is that there's conduct by the government that is so  
18 egregious as to negate the entire prosecution.

19 MR. GINGRAS: No, Your Honor, I don't --

20 JUDGE TRAXLER: Now, I'm not saying that's what happens,  
21 but if you want to presume the worst, that's the worst.

22 MR. GINGRAS: And for the moment, Judge Traxler, I think  
23 that even if you presumed the worst, quite frankly, under the  
24 *Brady v. United States* trilogy of cases, it's not just that  
25 there's egregious, impermissible misconduct. It would have to be

~~TopSecret/Codeword~~

24

1 conduct that actually -- there's a couple of standards, and I  
2 think *Ferrara* is instructive on this, and we've cited it in our  
3 original opposition to the first remand motion, and that is that  
4 you have egregiously impermissible conduct, and in that case, you  
5 have the government sort of manipulating their star witness, their  
6 almost sole piece of evidence against the defendant, and using  
7 that manipulated tale, this is according to the Court of Appeals,  
8 to actually strong-arm a defendant into a plea bargain where he  
9 gets a lesser sentence, and then they actually proffer that to the  
10 court at the plea hearing, where the defendant is allowed to  
11 remain silent as to the factual basis for the plea, and then the  
12 defendant goes on to deny at the PSR, he won't even take an  
13 acceptance of responsibility reduction.

14 JUDGE TRAXLER: I'm familiar with that case.

15 MR. GINGRAS: Right. Your Honor, so it's that sort of  
16 conduct that goes to actually coercing a guilty plea, and this is,  
17 this is sort of an entirely different universe. There is no  
18 suggestion anywhere nor could there be that any of these  
19 disclosures go to what the government's evidence was. There  
20 wasn't any bargaining here, and so -- and there's no --

21 JUDGE TRAXLER: That's just one example. That's just  
22 one way that government conduct can be egregious. That's  
23 certainly not limiting all the possibilities.

24 MR. GINGRAS: No, no, that's -- and I agree, Judge  
25 Traxler, but we're talking again in a guilty plea context --

~~TopSecret/Codeword~~

25

1 JUDGE TRAXLER: Right.

2 MR. GINGRAS: -- which is completely different.

3 I think that if you're referring to the sort of *Arizona*  
4 *v. Youngblood* line of cases, that's a subset of *Brady* which we  
5 will argue and we submit in our briefs is a trial thing, but even  
6 if you want to go down this sort of road of *Arizona v. Youngblood*,  
7 you would still have to show a coercive effect at a minimum.

8 And we know from the record that Moussaoui just -- it  
9 wasn't because the process was skewed. He just rejected anything  
10 less than a live witness in the courtroom. He says -- and this is  
11 not in the joint appendix, unfortunately, but his pro se  
12 pleadings, 1010 and 1018, the docket numbers, "I don't want a Rule  
13 15 deposition." He didn't even want the chance to question them  
14 on a two-way video, so how could it be that tapes would mean  
15 anything to him?

16 JUDGE TRAXLER: So your position is any egregious  
17 conduct would have to have an effect on what happened in court,  
18 that conduct cannot be so egregious that prosecution should be  
19 negated, whether it influenced or didn't influence a  
20 prosecution --

21 MR. GINGRAS: Your Honor --

22 JUDGE TRAXLER: -- I mean, the guilty plea.

23 MR. GINGRAS: I mean, we can all sort of imagine  
24 stomach-churning scenarios. I don't -- and that's a very tough  
25 question, and thankfully, it's one I don't think that we have to

~~TopSecret/Codeword~~

26

1 answer in this context, but I think you would still at a minimum  
2 in a guilty plea have to show that somehow, not necessarily in  
3 court, but that it affected the plea, and I think that's entirely  
4 consistent with the *Brady v. United States* line of cases.

5 JUDGE GREGORY: It would affect the plea, that is, he  
6 would not have pled guilty but for not knowing that.

7 MR. GINGRAS: That's right. That's one component.

8 JUDGE GREGORY: Wouldn't that be a big component, that,  
9 for example, you find that all of these purported statements made  
10 against him were extracted by draconian methods of interrogation,  
11 for example, and that's how they'd say, well, we have 15 people  
12 lined up, and this is what they've said about you, we don't have  
13 the tapes of them, but these are summaries, and it was extracted  
14 by some horrible, horrible torture, for example, you say unless,  
15 for example, that impacted him directly, that's not important to  
16 the plea in terms of voluntariness of it?

17 MR. GINGRAS: I think you would still have to show some  
18 sort of coercive effect, and given the state of the record -- and  
19 that would be at a minimum, Your Honor -- and given the state of  
20 the record and his repeated rejections, anything short of having  
21 [REDACTED] in the courtroom sort of belie any suggestion that he cared at  
22 all about substitutions.

23 And I just want to make this one point, if I may:  
24 Taping doesn't become an issue until the district court already  
25 concludes that the witness is material, and so Mr. Moussaoui has

~~TopSecret/Codeword~~

27

1 raised this sort of argument about materiality and the whole  
2 process being affected in his, in his reply to the most recent  
3 remand, so we didn't get a chance to respond to it, but I do want  
4 to say a couple words about it.

5 No one, including the district court or the defense,  
6 ever thought that the issue of taping was relevant to a  
7 materiality determination. The first time taping comes up, we're  
8 on interlocutory appeal, and this Court remands to consider  
9 substitutions.

10 The government proposes a substitution. The defense  
11 objects, and they have a lot of complaints about it, and -- but  
12 they mention in a footnote -- and this is in the classified joint  
13 appendix at 493 -- "Certainly the government has audio and video  
14 of the interrogations, so a verbatim record is available."

15 Well, that prompts the district court to then ask about  
16 the taping. She's like -- she says, "Yes, of course they're  
17 taping these, right? We should be able to have these to determine  
18 whether the substitutions are reliable."

19 So the parties are operating at that point with an  
20 understanding of something approaching this Court's analysis,  
21 which was the intelligence reports were reliable. They just  
22 disagreed about what they were reliable for; that is, the defense  
23 thought, well, they're not -- the Section 4 material we're getting  
24 is enough for us to determine whether we should have access to [REDACTED]  
25 [REDACTED] Zubaydah, but when it comes to the compulsory process

~~TopSecret/Codeword~~

28

1 right and protecting Moussaoui's right to a live witness, we've  
2 got to have something more reliable.

3 So what you really have is a sort of it's at the end of  
4 the day something that's totally irrelevant to the beginning of  
5 the process, that is, the materiality determination.

6 And so if I could, unless the Court has any other  
7 questions, I'd move on to --

8 JUDGE WILLIAMS: I want to ask one question about the  
9 tapes. When we had asked about the tapes and were told that there  
10 were none, were they actually there at the time, or did they later  
11 find them?

12 MR. GINGRAS: The -- and I'm sorry, Your Honor, by  
13 "they," you're referring to the --

14 JUDGE WILLIAMS: I think it was the 2005 maybe --

15 MR. GINGRAS: The -- I'm trying to keep the chronology  
16 straight amongst many years. The government -- the prosecution --  
17 the prosecutors in this case didn't learn about taping until 2007.  
18 If you're asking about during one of the interlocutory appeals, I  
19 think the tapes go back, and I think we've disclosed this, for  
20 example, [REDACTED]

21 So again, this is not a situation that we are happy  
22 with, obviously, because -- and I do want to say one -- make one  
23 remark about [REDACTED] You know, at the time, you're  
24 talking about some of the most highly sensitive, compartmented  
25 information. This was not something that we just sort of gossiped

~~TopSecret/Codeword~~

29

1 about at the -- sitting around having lunch. We don't doubt  
2 the --

3 JUDGE WILLIAMS: We were all looking at that. We were  
4 reading that stuff, but we didn't get the tapes.

5 MR. GINGRAS: No, and I'm, I'm just going to the issue  
6 of [REDACTED]

7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED] We think he

10 probably did say something about them to someone on the  
11 prosecution team, but as you know, when you're speaking about  
12 these things and speaking in circumlocutions, there was sort of a  
13 miscommunication.

14 But at the end of the day, it's still irrelevant to the  
15 question of sort of the process and the reliability determination  
16 that this Court made just based on what was at issue based on the  
17 fact that the government was making these life-or-death decisions  
18 based on this information. That was enough for it.

19 And so while again, I don't, I don't want to be  
20 repeating myself, but we are obviously apologetic and not happy  
21 that this has unfolded the way it has, and we do take our duty of  
22 candor very seriously, the reason we're not agreeing to a remand  
23 like we did in *Al-Timimi*, for example, is there's -- I believe  
24 that we did in *Al-Timimi*, Your Honor; I may be wrong about that --  
25 but we just simply don't believe that there's anything to be

~~TopSecret/Codeword~~

30

1 gained given the state of the record either with regard to the  
2 reliability or the materiality and that clearly Moussaoui just  
3 didn't care about this whole process at all.

4 JUDGE TRAXLER: Let me ask you a question.

5 MR. GINGRAS: Sure.

6 JUDGE TRAXLER: You're obviously being very careful as  
7 to the representations you make today to the Court --

8 MR. GINGRAS: I'm trying to, Your Honor.

9 JUDGE TRAXLER: -- and I understand that, but if, if we  
10 didn't remand it and more tapes come to light, what recourse does  
11 the defendant have?

12 MR. GINGRAS: I don't think he would have any, Your  
13 Honor, and I think that's our point of why the remand is  
14 unnecessary.

15 JUDGE TRAXLER: Regardless of what they might, say,  
16 reveal?

17 MR. GINGRAS: I think you could imagine the worst --  
18 he's already gotten -- the substitutions that he's getting -- that  
19 he eventually got by the time the penalty phase rolls around, I  
20 mean, he can read about again in the 9/11 report and he can  
21 discuss with his counsel in the case of the [REDACTED]  
22 substitutions, they were saying he wasn't part of the plot.

23 This Court had that in front of it, that they were  
24 providing material, exculpatory information both as to guilt and  
25 as to punishment. He's not part of the plot. I can't -- it's



~~TopSecret/Codeword~~

31

1 hard for me to imagine what would be more exculpatory than that.

2 If the question is about reliability, I think that  
3 question has already been answered, and I won't, I won't repeat  
4 it.

5 So those are sort of two separate questions. The  
6 exculpatory question, it just again is unlikely given who  
7 Moussaoui was and the fact that anything about him was likely to  
8 have foreign intelligence value.

9 So we don't want to be unreasonable, obviously, Your  
10 Honor, but there's nothing to be gained other than a wholesale  
11 exploration of what you would have done if you would have known  
12 this, and in order to do that, he would have to completely change  
13 his positions or he'd have to completely contradict what he's  
14 already said in everything, in the ex parte proceeding, at the  
15 guilty plea, you knew you were waiving constitutional rights. All  
16 that is relevant, and I go back to that because that is the place  
17 to start.

18 I'm running short on time here, so I'd like to just  
19 touch on a couple of other points that Mr. Antonipillai raised.  
20 The Carla' Martin issue, this Court has already denied remand on  
21 those grounds, so I profess I'm not -- I don't completely remember  
22 all the ins and outs of the Cammaroto e-mails other than that  
23 they, they seemed very innocuous, and so I would just rely on our  
24 papers that we had filed the first time.

25 With regard to [REDACTED] defense counsel knew in

~~TopSecret/Codeword~~

32

1 February of 2004 already that he had admitted to -- and I see I'm  
2 out of time. If I can finish, sum up?

3 JUDGE WILLIAMS: Go ahead.

4 MR. GINGRAS: That he was slated to be part of the  
5 operation or appeared to be slated to be a part of the operation  
6 and he'd said as much, so this is long before Moussaoui pleads  
7 guilty.

8 And so with that, I would just --

9 JUDGE WILLIAMS: I've got one more question.

10 MR. GINGRAS: Sure, Your Honor.

11 JUDGE WILLIAMS: Given Judge Brinkema's public  
12 statements about the government's conduct in this case, do you  
13 think she can continue sitting on this case if we were to remand  
14 it?

15 That's a tough question.

16 MR. GINGRAS: Your Honor, honestly, I've not thought  
17 about that. I can -- I can't make a representation as I stand  
18 here. I apologize for that. That would be a, something that  
19 several people would have to think through, and I apologize, I'm  
20 not able to answer your question.

21 JUDGE WILLIAMS: It would seem to me that that would be  
22 a question. Thank you.

23 MR. GINGRAS: I do have one last point that I do want to  
24 address because I didn't get to say it in the opening portion is  
25 this idea that no one believed Moussaoui. Twelve jurors found

~~TopSecret/Codeword~~

33

1 beyond a reasonable doubt based on the evidence that the  
2 government put forward, his testimony, and made specific findings  
3 about his credibility and his competency, and so I would just rely  
4 on those findings.

5 Thank you.

6 JUDGE WILLIAMS: Thank you.

7 MR. ANTONIPILLAI: Happily, I assure the panel my time  
8 is limited, so I would make just a few points.

9 JUDGE WILLIAMS: And what would your answer be to that  
10 same question that I asked about Judge Brinkema?

11 MR. ANTONIPILLAI: I have the same answer. I have not  
12 conferred with my co-counsel on that issue. I had viewed it more  
13 as a remand was necessary because the district judge was outraged,  
14 had asked specific questions. I don't -- I have not yet thought  
15 about whether that would make the judge biased in some way. I  
16 haven't seen any indications of it.

17 I saw the statements as more indicative out of a respect  
18 for the district court, to have the district court have a chance  
19 to review this, but I have not thought about the disqualification.  
20 I apologize.

21 I thought I would briefly make the -- explain what we  
22 were saying about the materiality. So the simple question is if  
23 everybody had known about the tapes, when would they have come  
24 out? That's really the pertinent question.

25 What would have happened is when the, when the

~~TopSecret/Codeword~~

34

1 government went to the court and said, "We want -- these  
2 intelligence summaries are the ones that we want produced to the  
3 defense," that's what occurred, the intelligence summaries were  
4 produced to us instead of the cables, the government would have  
5 been obliged to produce to the district court not only the cables  
6 but the tapes.

7 That's the whole point of CIPA 4. You're supposed to be  
8 comparing what you are producing as a substitute to the raw  
9 material that you are not wanting to produce.

10 So the point we've been making about this is there are a  
11 lot of decisions that the district court made in the absence of  
12 tapes that should have been produced to the district court under  
13 the representations that the district court was making.

14 The government says, well, look, there was no challenge  
15 to the materiality determinations. The reason is because all of  
16 the CIPA 4 process that I've just described, where the government  
17 produced the cables and then the court approved production of the  
18 summaries, that was all ex parte. The defendants never got to  
19 participate in that process and, indeed, didn't know what it was  
20 that the district court was ruling on.

21 The district court surely would have wanted to know that  
22 it was approving summaries that put the defendant in the same  
23 place as the cables. She would have wanted to know that there was  
24 actually tapes out there.

25 Let me be concrete about how this affected Moussaoui

~~TopSecret/Codeword~~

35

1 with Zubaydah, for example. The district judge determined that  
2 Abu Zubaydah was not a material witness. At the time she made  
3 that determination, she only had the cables and the substitutions,  
4 the intelligence summaries.

5 As we've described, the, the chronology about the actual  
6 destruction of the Zubaydah tapes, again, I don't have a record on  
7 which to say anything intentional of her, but the chronology is  
8 troubling. At the time the Zubaydah tapes were destroyed, the  
9 defense had filed a motion for reconsideration to get access to  
10 Zubaydah. The government had said on the record, "We're going to  
11 produce everything that relates to Zubaydah, but we oppose any  
12 argument that Zubaydah is material." This was in November of  
13 2005.

14 Before the court ruled on whether or not the defense  
15 could have access to Zubaydah, again, in the middle of -- with a  
16 pending motion, according to all of the press reports, that's when  
17 the government destroyed all of the tapes of Zubaydah. That's  
18 troubling.

19 I think the district court will want to know how -- that  
20 timing is just very weird. There's a pending motion to get access  
21 to Zubaydah, and they destroy all of the tapes at a moment when  
22 the government has represented to the court that it's going to  
23 produce everything relating to Zubaydah. That's why there's  
24 probably a criminal case investigating this.

25 But the -- let me, let me again -- the reason we've

~~TopSecret/Codeword~~

36

1 speculated about some of this is that the disclosures to us in the  
2 letters have been hard for us to know what to do with. For  
3 example, Mr. Gingras said in the last testimony that the  
4 prosecution did not know about this tapes issue until 2007. Yet  
5 there was a letter that was produced to us that says [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 I don't even know what to think of that. I mean,  
10 normally you would want a judge to make a finding did the  
11 prosecution know or not, and I don't want to accuse the prosecutor  
12 of having known this based on that disclosure.

13 The same as for whether there are more tapes. [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 It may be that that's dispositive, but the district  
23 court should be permitted to just figure that out and make a  
24 ruling on that issue.

25 Also, the government says, well, look, nothing in

~~TopSecret/Codeword~~

37

1 those -- the transcripts of the tapes was relevant to 9/11, but,  
2 of course, that ignores -- may I finish the point, Madam Chief  
3 Judge? May I finish the point?

4 JUDGE WILLIAMS: Yes.

5 MR. ANTONIPILLAI: That ignores that Moussaoui was  
6 charged, as the government says over and over, with a broader  
7 conspiracy than just 9/11, so somebody should be able to figure  
8 out whether there's something on these tapes that relates to, to  
9 more than just 9/11.

10 I had two final points that I was just going to give  
11 cites briefly, if the Court would permit me, but I can also submit  
12 them by letter. One is there was a statement about Moussaoui not  
13 wanting any of the summaries, and we've -- there's a -- it's a  
14 fine point.

15 Moussaoui didn't want to -- want substitutions used at  
16 trial; he wanted the actual live witness; but he clearly wanted  
17 the intelligence summaries. There's request after request that we  
18 cite where Moussaoui says, "Please give me the summaries that the  
19 Fourth Circuit said I should have had." Some of them are in the  
20 classified joint appendix, and some of them are in the public  
21 record, but we've cited a bunch of them.

22 So it's clear that Moussaoui wanted the summaries,  
23 especially because the Fourth Circuit said he's entitled to them,  
24 and this was before the plea.

25 And Moussaoui could really not have known that he was

~~TopSecret/Codeword~~

38

1 going to get them, because both himself and his standby counsel  
2 and then appointed counsel repeatedly asked for these summaries,  
3 and the district court's order doesn't say you're going to get  
4 them. What it says is you're not going to get them until the  
5 government -- until and unless the government produces a  
6 declassified substitute.

7 That doesn't give Moussaoui any comfort that at some  
8 point he's going to get the declassified summaries. All it says  
9 is if the government produces it, you'll get them. Otherwise,  
10 you're just going to have to rely on your counsel, and that's not  
11 the same thing.

12 And finally, in both the October 2, 2002, and  
13 February 3, 2003 CIPA transcripts, which are in the record, the  
14 district court specifically explains why it is that references in  
15 public documents like the 9/11 report, newspapers, public versions  
16 of the brief, don't really cure the, the discussions with counsel  
17 issue that I've raised.

18 She says at one point -- there's an article in *The Post*  
19 that discusses some classified information, and the judge  
20 says, "That erodes any scintilla of confidence that Moussaoui has  
21 either in the Court, the judicial process, or his standby  
22 counsel." That's because there's stuff being revealed that's  
23 classified or arguably classified in the papers, he goes to talk  
24 to his lawyers, they can't confirm it, he raises it with the  
25 court, they can't confirm it.



~~TopSecret/Codeword~~

39

1           So the notion that Moussaoui's Sixth Amendment right was  
2   cured by any disclosure in the 9/11 report or in any other public  
3   document is just absolutely wrong, and the district court knew it  
4   and, in fact, made a specific finding that the 9/11 report did not  
5   put Moussaoui in the same place he would have been had he received  
6   the classified information that I have pointed out during argument  
7   today.

8           JUDGE TRAXLER: Are you asking for a remand and a delay  
9   in a decision on the merits?

10          MR. ANTONIPILLAI: Yes, Your Honor. On the, on the  
11   tapes issue, we had suggested that the Court temporarily remand,  
12   as it's done in, say, *Al-Timimi* and some of the other cases, so  
13   that the district court can make the record and then send the  
14   record up for this Court to properly rule on.

15          JUDGE TRAXLER: Okay.

16          MR. ANTONIPILLAI: Thank you very much.

17          JUDGE WILLIAMS: Thank you.

18          Oh, I'm sorry, did you have something?

19          MR. GINGRAS: No.

20          JUDGE WILLIAMS: We'll come down and speak to you-all.  
21   We'll adjourn court.

22                               (Which were all the proceedings  
23                               had at this time.)

24

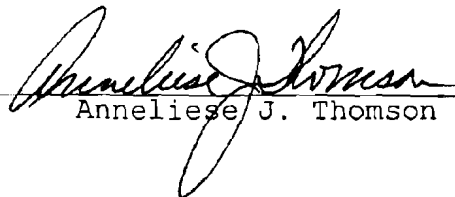
25

~~Top Secret/Codeword~~

40

CERTIFICATE OF THE REPORTER

I certify that the foregoing is a correct transcript of the  
record of proceedings in the above-entitled matter.

  
Anneliese J. Thomson